NUMBER: 92-1539

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

SUPREME COURT OF THE
UNITED STATES OF AMERICA
----------X

TERM: OCTOBER, 1992

TERRY HASENSTAB

PETITIONER,

-AGAINST-

ROBERT J. McGUIRE AS POLICE COMMISSIONER OF THE CITY OF NEW YORK, AND AS CHAIRMAN OF THE BOARD OF TRUSTEES OF THE POLICE PENSION FUND, ARTICLE TWO, THE BOARD OF TRUSTEES OF THE POLICE PENSION FUND, ARTICLE TWO, NEW YORK CITY POLICE DEPARTMENT AND THE CITY OF NEW YORK

RESPONDENTS
----------X

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

TERRY HASENSTAB
42 PECONIC DR. NO.
MASSAPEQUA, N.Y.
11758
516 795 3877

QUESTIONS PRESENTED FOR REVIEW:

1. Did New York State's high-court holding, Matter of Deas v. Levitt, 73 NY2d 525, violate petitioner's "Equal Protection" and "Due Process" rights--whereby, similarly situated residents of New Jersey, Texas and Ohio enjoy a more favorable [p]ostdeprivation State remedy, pursuant to their high-court decisions that are in conflict with Deas, supra?

2. Did the New York State courts err when they failed to sustain petitioner's contention, that the New York City Police Department violated his State/Federal "Equal Protection" rights, when they placed him before the Department's Medical Board, prevented his promotion and forced him to retire--in conflict with treatment they accorded others?

3. Does New York's high-court holding, in Deas, supra, which is in conflict with the high-court decisions of New Jersey, Texas and Ohio--including that of the United States Court of Appeals, Sixth Circuit, violate Federally-protected "Due Process," by defeating timely judicial challenges of administrative determinations (with the expiration of the eligible list at issue), [r]ipen the considerations governing the review of this Court, pursuant to Part 111, Rule 10, thereof?

4. Did the New York City Police Department's failure to notify the petitioner, as required by the "notice provision" of New York Civil Service Law Section 50 (4), that they had disqualified him from promotion to sergeant, which defeated, thereby, his right to notice and a hearing, violate his right to procedural "Due

Process," as provided for in, and protected by, the Fourteenth Amendment to the United States Constitution?

5. Did the petitioner have a protected property interest, created by the State, in being fairly considered for promotion, with required notice of his disqualification, therefrom (New York Civil Service Law Section 50, 4); and the concomitant right to be heard, as provided for in Sections 812 (C), 813 (A)(3)-(8), (B) 5 of the New York City Charter--which were defeated by government action?

6. Did New York's courts err when they failed to give effect to petitioner's right to remedy violations of "Equal Protection" and "Due Process" under Title 42, United States Code, Section 1983, as advanced, therein?

7. Does New York's high-court holding, in Deas v. Levitt, supra, which provides remedy (appointment from an expired civil service list) for those who challenge--only--their position on an eligible list--in a judicial proceeding--and prevail, but denys equal treatment to others who challenge their disqualification, violate State/Federal "Equal Protection;" in addition to procedural "Due Process," by failing to provide an adequate State postdeprivation remedy?

8. Did the Appellate Division majority, of the New York County Supreme Court, and the New York State Court of Appeals err, when they held that the rescored eligible list, on which the petitioner's name appeared, was not promulgated until September 9, 1983; and, therefor, the "notice provision," of New York Civil Service Law Section 50 (4) was not applicable to him--although the [a]nticipation of disqualification ripens this stat-

ute, and that event took place before September 9, 1983, and prior to August 20, 1983?

9. Did the Appellate Division majority, of the New York County Supreme Court, and the New York State Court of Appeals err, when they determined that the petitioner was distinguishable from the other "seriously injured" Police Department members, who were promoted to competitive positions, and allowed to remain, therein--because they had not been examined and approved by the Medical Board, for accident disability; although it was action taken on the part of the Police Department, that placed the petitioner before that Board?

10 Did the Police Department's failure to provide the petitioner with their reasons for his disqualification (in accordance with the "notice provision" of New York Civil

Service Law Section 50, 4), violate his right to procedural "Due Process," by precluding judicial review, thereof; in addition to their failure to disclose to him, that they had, in fact, promoted others, all of whom were injured more seriously than he, to competitive positions--and allowed them to remain with the Department?

11. Did the petitioner have a protected property interest in being fairly considered, to continue his employment--subsequent to his injury (in the line-of-duty); and the concomitant right to be heard, to protect that interest--especially since others, similarly situated, were treated differently?

12. Does the substantial number of individuals that are disqualified each year (throughout New York State), from civil service appointments, and who are, either precluded from judicial challenge, thereto, or defeated, therein, by Deas v. Levitt 73 NY2d 525

(pursuant to the expiration of his/her eligible list) warrant the protection of the substantive due process clause, as well as procedural; and, does the New York City Civil Service Commission's uncomplimentary view, of the manner in which 132 police officer eligibles were disqualified by the New York City Police Department, in January of 1992 (List 7009) exacerbate this question?

13. Did the Police Department's failure to notify the petitioner, that he could have opposed the Medical Board's decision (pursuant to statute, New York City Administrative Code Section 13-206(d)), which prevented his right to a hearing--to protect against the taking of his job--violate the due process Clauses, and other law; in view of the facts that they treated others, similarly situated, differently, in addition to failing to advise petitioner of these events?

14. Did the petitioner have a protected property interest in, as well as a statutory right to, oppose the Medical Board's decision, to defend against the taking of his job?

15. Did the United States District Court err, when it held that the petitioner had not raised, or pleaded any Federal Constitutional claims--in his State court petition and first motion to reargue; although he advanced, therein, that others who were similarly situated to him were promoted, and allowed to remain with the PD, in addition to his not having been notified that he had passed Exam 8539--until after he had retired--which could not have constituted reasonable notice of petitioner's disqualification, and precluded his right to be heard? And, therefore, was that court's dismissal, based upon res judicata, in error?

16. Did the petitioner suffer a new injury. which occurred from a separate transaction--pursuant to his due process claim--when the PD advised him that, they had reconsidered

their determination, and decision was not to promote him, retroactively, citing Deas v. Levitt, 73 NY2d 525 as controlling precedent; and when the Supreme Court dismissed, accordingly, his petition--because it **defeated** petitioner's opportunity to be heard (petitioner advanced claims, pursuantly, in his "Affirmation" of July 11, 1990, RA at 337-344, and his Appellate Division "Reply" brief at Pages 12-13)? And, which was in addition to petitioner's previous claims of due process violations.

17. Did the application of Deas, on the part of the PD and the court, as in Question 16, supra, constitute a **new equal protection** injury to the petitioner--from a separate transaction--in that Deas denied him a post-deprivation remedy which is enjoyed by residents of New Jersey, Ohio and Texas; pursuant to the expiration of his civil service eligible list (petitioner advanced claims, pursuantly, in his "Motions" of October 8, 1990, RA at 377-380, 398-399; and November 16,

1990, RA at 420-422)? And, which was in addition to petitioner's previous claims of equal protection violations.

18. Did the PD's failure to notify petitioner of the events in which they promoted others, who were similarly situated to him (and, that they allowed them to remain with the Department), in addition to their not having advised him that, he could have--pursuant to statutes--opposed both their determination of his disability, and disqualification from promotion, vitiate any challenge by respondents to the timeliness of when the petitioner raised these issues? And, since the PD abrogated their responsibility (as the initiator of petitioner's termination and disqualification from promotion) to advise petitioner of these issues--should the time that he discovered these events, and disregarded statutes, be focused upon in an issue of timeliness?

19. Did the PD's discriminatory treatment of the petitioner, pursuant to his disability, violate the Federal "Americans With Disabilities Act," which was enacted on July 26, 1992--and while this matter was still sub judice (before the New York State Court of Appeals, for reconsideration of its decision, as requested by petitioner)?

TABLE OF CONTENTS

Page

Questions presented for review.....A1-A11

Jurisdictional Statement.....1-2

Statement of facts.....3-10

FEDERAL QUESTIONS
(In accordance with subparagraph .1(h) of Rule 14); where raised--and how courts passed upon them.

EQUAL PROTECTION

New York County Supreme Court.....10-14

Appellate Division.....14-15

New York State Court of Appeals.....15-16

DUE PROCESS

New York County Supreme Court.....16-19

Appellate Division.....19-22

(Appellate Division dissent).....20-22

New York State Court of Appeals.....22-23

ARGUMENT

(Preliminary statement.... 24

EQUAL PROTECTION.....24-46

Conclusion.....46-47

DUE PROCESS.....48-63

Conclusion.....63-64

CONTENTS

Page

Relief sought.... 64-65

(Pursuant to Section 1983 of Title 42, United States Code).....64

Table of Authorities (four documents)

Appendix, pursuant to Rule 14(h), (three documents).

Appendix, pursuant to Rules 14(f) and 14(k), (four documents).

TABLE OF AUTHORITIES

Page

Anderson Nat. Bk. v. Luckett, 321 U.S. 233..... 48

Board of Regents v. Roth, 408 U.S. 564.60

Canarelli v. New York State Dept. of Civil Service (1974), 44 A.D. 2d 645...55

Cassidy v. Municipal Civ. Serv. Comm. 37 N.Y.2d 526..... 60

Charles v. Baesler (6th Cir., 1990) 910 F.2d 1349..... 41-42
.....57

City of New York v. City Civil Serv. Com'n (1988), 141 Misc.2d 276.....50
.....55

Deas v. Levitt (1989), 73 N.Y.2d 525...A1-A2
...A4
...A6
...9
...19
...25
...40
...41
...46
...49
...54
...56
...58-59
...61-62

Dower v. Poston (1973), 76 Misc.2d 721.....50

Drogan v. Ward, 675 F. Supp. 832.....61

AUTHORITIES

Page

Duckett v. City of Houston (1973), 495 S.W.2d 883.....44-45
.....56

Ferrine v. Babou (1980), 75 A.D.2d 669..... 50

Firemen's & Policemen's Civil Serv. Com'n v. Kennedy (1974) 514 S.W.2d 237.....45

Fourteenth Amendment to the United States Constitution.....2
.....12-13
.....17-20
.....22-23
.....38
.....40
.....43
.....47-48
.....58
.....64

Grifin v. Carey (1982), 547 F. Supp. 449.....50
.....62

Harrah Independent School District v. Martin, 440 U.S. at 197-98.....57

Hart v. Bronstein (1974), 43 A.D.2d 936.....50

Kinney v. Ohio State Dept. of Admin. Serv. (1984), 469 N.E.2d 1007.....35

Levoci v. Brown (1991) NYLJ at 22, col. 3.....55

AUTHORITIES

Page

Malone v. Fender (1979), 80 N.J 129...43

Marranca v. Harbo (1964), 41 N.J. 569..42-43

New Jersey Administrative Code, Title 4A (4A:4-3.4).....45

New York City Administrative Code, Section 13-206 (d).....32-36
.....49
.....56
.....63

New York City Charter, Sections 812 (C), 813(A)(3)-(8),(B)5. .....A3
.....21
.....60

New York Civil Practice Law & Rules 5701(C).....8
7804(E).....7
.....11

New York Civil Service Law, Section 50 (4).....A2-A5
.....4
.....8
.....18
.....20-23
.....28-30
.....37-38
.....49
.....63

AUTHORITIES

Page

New York Civil Service Law, Section 61.....5
.....45
.....51-52
.....61

Ramsey v. Bd. of Ed., Whitley County Kentucky (1988)(6th Cir.), 844 F.2d 1268.....57

Regents of the University of Michigan v. Ewing, 474 U.S. 214.....57

Rule 4.3.2 of the New York City Personnel Director.....37-38

Section 3.6 of the Rules & Regulations of the Department of Civil Service (4NYCRR)..... 61

Shirokey v. Marth (1992), 585 N.E.2d 407.....43-44

Sullivan v. Brown (6th Cir., 1976) 544 F.2d 279.....58

Title 42, United States Code, Section 1983.....A3
.....12
.....15
.....17
.....20
.....64

Yick Wo v. Hopkins (1886) 118 U.S. 356.....38

Zinermon v. Burch (1990), 494 U.S. 113.....63

JURISDICTIONAL STATEMENT

Petitioner invokes the jurisdiction of this Court pursuant to his contentions that, his Federally-protected rights, to both "Equal Protection" and "Due Process," were violated--by actions undertaken by the New York City Police Department--while he was an employee, thereof. And further that, although petitioner raised these issues, in the courts of New York State--they failed to provide adequate remedy.

The judgment sought to be reviewed was entered in the New York State Court of Appeals on June 11, 1992--which affirmed, without memorandum, the decision of the Appellate Division, New York County Supreme Court, entered on December 12, 1991; a reargument motion, having been made to the Court of Appeals, was denied--with entry, thereof, on September 22, 1992.

The statutory provision, conferring upon this Court the jurisdiction to review the

judgment of the New York State Court of Appeals, is the Fourteenth Amendment to the Constitution of the United States of America.

CONSTITUTIONAL PROVISIONS STATUTES ORDINANCES REGULATIONS

1. New York City Administrative Code Section 13-206(d).
2. Fourteenth Amemdment to the United States Constitution, Due Process and Equal Protection Clauses.
3. New York Civil Service Law Section 50 (4).
4. Rule 4.3.2 of the New York City Personnel Director.
5. United States Code, Section 1983 of Title 42.

The verbatim quotation of the pertinent text, pursuant to item (2), supra, is presented on Page 40 of the petition; and item (3), at Page 49. The pertinent text of items (1), (4) and (5) are set forth in the **Appendix**, hereto, in accordance with subparagraph .1(f) of the Court's Rule 14.

STATEMENT OF FACTS

Petitioner, a retired New York City Police Officer, was seriously injured in the line-of-duty on May 5, 1982. Subsequent to his injury, petitioner was directed--by his Police Surgeon (Police Surgeons hold the rank of "Inspector" in the Police Department; hereinafter, the "PD")--to file for disability retirement (RA at 179, 208). In November of 1978, petitioner took Exam 8539--for promotion to sergeant; and he was notified, thereafter, that he had failed (RA at 18). Pursuant to a successful judicial challenge, and an order of the court, Exam 8539 was rescored (RA at 19-28); and petitioner's name appeared on the additional list of passers (RA at 65-82 reflects the incorporation of the additional passers into the original list--all of the original passers had already been promoted, therefrom). Although he had passed Exam 8539, pursuant to its rescoring, petitioner was

[n]ot notified, until after his forced retirement, of that event! Pursuant to his forced application, for disability retirement, petitioner was examined, and approved by, the PD Medical Board on June 7, 1983 (RA at 61); although the same Board had examined the petitioner on February 8, 1983, determined that he was not disabled, and disapproved his retirement application (RA at 58). On August 17, 1983, those who had passed Exam 8539, pursuant to its rescoring, were notified to attend a basic management course, commencing on August 22, 1983 (RA at 83). Petitioner was excluded from attending the course, supra, and was [n]ot notified--as required by New York Civil Service Law Section 50 (4)--that he had been disqualified from promotion to sergeant; although the anticipation of disqualification, ripens the "notice provision" of the statute, supra. It should be noted that all of the candidates who passed Exam 8539 were promoted in regular order, according to the listings; and that the Police Commissioner did not exercise his discretion,

pursuant to New York Civil Service Law Section 61 (option to appoint one of three persons standing highest on an eligible list), to preclude the petitioner's promotion. On August 23, 1983, the Pension Board of Trustees met and approved petitioner's application for disability retirement--which he had been directed to file for! The petitioner was directed to report to the PD Pension Section, for processing, on September 1, 1983. Unaware that he had passed rescored Exam 8539, and that he had been disqualified from promotion, to sergeant, petitioner waived over 105 days of accrued leave, and retired effective August 31, 1983--upon the advice of processing personnel, that by doing so, he would decrease his tax liability for that year. On September 12, 1983, all of the candidates who were ordered to report to the management course were promoted, in regular order, according to the listings--the Police Commissioner did not exercise his discretion, pursuant to Section 61 of the Civil Service Law, supra, with re-

spect to any eligible on List 8539; this has remained undisputed, since the onset of this action. On September 15, 1983, petitiner received notice that he had passed Exam 8539 (RA at 29). It should be noted that the respondents have consistently advanced, to the State courts, that their only reason for preventing the petitioner's promotion, was his medical condition; and further that the petitioner had an [u]nblemished service record, he had always received superior performance ratings and was awarded twenty-five medals for bravery and outstanding police work--from the Police Commissioner. Although the PD had promoted a substantial number of other officers, to competitive positions--under the very circumstances for which they advanced (to the State courts) was the reason that they prevented the petitioner's promotion (all were injured at least, if not more serious than was the petitioner)--they failed to advance the facts of these events; and rather, "intentionally,"

withheld that information--in [v]iolation of the disclosure mandate, pursuant to Article 7804 (e) of the New York Civil Practice Law and Rules. It was after the facts and circumstances, of these events, supra, were hinted to the petitioner, that he instituted a judicial proceeding--in January of 1984--challenging the PD's determination. Petitioner's original motion (RA at 11-17, 98-99) and his first motion seeking renewal (RA at 108-113) were denied--due to the petitioner's inability (at that time) to obtain, and furnish the court with, documentation that supported his claims; that other PD members, of a "like" classification, were promoted to competitive positions, "in addition to being allowed to remain with the PD," under the precise circumstances for which the petitioner's promotion was prevented, and he was forced to retire. Petitioner, subsequently, obtained the documentation that supported his claims, and filed a second motion to renew (RA at 142-150, 180-181, 196-207). In a memorandum opin-

ion (October 28, 1987, RA at 259-270) the motion court remanded to the PD--directing that they reconsider their determination (not to promote the petitioner), pursuant to the court's finding of arbitrary and unlawful conduct, in their treatment of the petitioner; demonstrated by the new evidence submitted. That court noted, in addition, the PD's failure to notify the petitioner of his disqualification--as required by New York Civil Service Law Section 50, 4 (RA at 268)--which precluded his right to be heard. Respondents requested permission of the motion court--to appeal its order and judgment; that motion was denied on February 9, 1989 (RA at 281). Respondents never pursued their option to seek Appellate review of the motion court's order and judgment, as provided for in Section 5701 (C) of the New York Civil Practice Law and Rules. In response to a "Demand For Compliance," with the court's order (RA at 292-293)--the PD notified petitioner of their de-

cision not to promote him (RA at 296); which was based, solely, upon the New York State Court of Appeals' decision, Deas v. Levitt, 73 NY2d 525, because the list on which petitioner sought promotion had expired (while this matter was before the motion court). Petitioner returned to the motion court arguing that, pursuant to its memorandum opinion, the PD was not free to exercise discretion, in their reconsideration; and therefore, although remanded, its decision constituted [f]inal judgment (RA at 282-283, "Order To Show Cause;" 284-290, "Motion For Contempt;" 331-350, "Affirmation In Support Of Contempt"); that this matter had become final against respondents, when they failed to seek Appellate review of the motion court's order--when that court denied their request for permission to appeal; that the cloak of res judicata precluded the application of Deas, supra, to this matter, because it was no longer sub judice, when that matter was finally decided. Based upon the Deas decision, the motion court dis-

missed the petition (RA at 361-364). After several reargument motions (RA at 365-399, 412-436, 443-456) were denied (RA at 440-442), petitioner appealed to the Appellate Division of the New York County Supreme Court. That court affirmed with a three to two majority. Pursuant to a two Justice dissent, petitioner appealed, as of right, to the New York State Court of Appeals; which affirmed on June 11, 1992. Petitioner's motion to reargue was denied on September 22, 1992.

FEDERAL QUESTIONS

"Statement in accordance with subparagraph .1(h) of Rule 14 (where raised, method or manner, and how courts passed upon them)."

1. **"EQUAL PROTECTION"**

NEW YORK COUNTY SUPREME COURT

First raised in this (IAS) motion court (RA at 110-111, November 21, 1984--"Affirmation In Support Of Motion To Renew/Reargue).

The petitioner advanced, in his moving papers, supra, that other PD members, who were injured at least, if not more serious than he, were promoted--to both "competitive" and "non competitive" positions--within the Department; but was, however, at that time, unable to furnish the court with documentation that supported his claims; and although the respondents knew that the petitioner's claims, supra, were entirely accurate--they "intentionally" [w]ithheld, from both the petitioner and the court, notice of these events, in violation of the disclosure mandate, pursuant to Article 7804 (e) of the New York Civil Practice Law and Rules (RA at 130-136, respondents' "Affirmation In Opposition To Motion For Reargument And/Or Renewal"). The motion court distinguished the petitioner, from the other PD members named in his renewal moving papers, at that time, and denied reargument/renewal (RA at 139-141).

Subsequent to the court's denial of his motion, supra, and prior to his second motion

to renew, petitioner filed (upon the advice of his attorney) an action in the United States District Court, Southern District, pursuant to the provisions of 42 U.S.C., Sections 1983 and 1988 and the Fourteenth Amendment to the Constitution of the United States--for violation of due process; that court dismissed the action, based upon res judicata (RA at 246-258).

Subsequent to the filing of the federal action, supra, and prior to the decision of that court, the petitioner was able to obtain, through clandestine efforts, documentation that supported the information that was hinted to him (RA at 152-178), and filed a second motion seeking renewal (RA at 142-181, September 23, 1986, 196-219, "Affirmation In Support," February 25, 1987). The contention that petitioner's equal protection rights had been violated, was advanced to the court, in his moving papers, supra (RA at 206-207. By notice of a letter to the court, dated August 20, 1987 (RA at 218-219) petitioner

included a claim of violation of federally-protected due process--in addition to that of the state, which had been previously advanced to that court. That court "remanded" to the PD, directing that they reconsider their determination, not to promote the petitioner--upon its finding of arbitrary treatment, and unlawful conduct, in failing to notify the petitioner--as required--of his disqualification (RA at 262-271). Although the motion court articulated, in the memorandum opinion, thereof, a finding of disparity in the PD's treatment of the petitioner (RA at 262-271)--that court failed to express a specific declaration, that his equal protection rights had been violated.

The petitioner reiterated his claim of violation of equal protection, in his support papers of a "Contempt Motion" (RA at 340, 344). On August 23, 1990, the motion court dismissed both the contempt motion, and the Article 78 petition (RA at 361-364); the court did not express, therein, that it had considered the

petitioner's claims of equal protection violations.

Petitioner reargued the court's decision, supra, and again raised his contention of violation of equal protection (RA at 377-380, 398-399; October 8, 1990; 414, 420-422; "Support Affirmation," November 16, 1990) In a decision dated January 22, 1991, the motion court denied reargument (RA at 440-442)--and noted, therein, that it did not believe petitioner suffered any "cognizable" claim, based on the equal protection clauses (RA at 442).

Petitioner reargued the court's decision, supra, and, once again, raised his contention of violation of equal protection (RA at 452-456; February 11, 1991). Decision of that court, although not a part of the record, was to deny reargument; the court did not express that it had considered the merits of petitioner's equal protection claims, therein.

APELLATE DIVISION

Petitioner advanced his contention that the PD violated his equal protection rights

in Petitioner/Appellant's Brief at P.7-23, P.67 (wherein he sought relief pursuant to Section 1983 of Title 42, United States Code); which was served on July 2, 1991. The majority of that court distinguished the petitioner from the other PD members--because, although they were disabled, they had not been examined by the Medical Board, prior to their respective promotions; without giving effect to the fact that, it was action undertaken by the PD that placed petitioner before the Medical Board--although the PD failed to apply the same treatment to the other injured members (P.B16, Appellate Division memorandum).

NEW YORK STATE COURT OF APPEALS

Petitioner advanced his contention that the PD violated his equal protection rights in his "Jurisdictional Statement" at P.5-7 (served on January 29, 1992). Petitioner advanced his contention, supra, in his "Argument In Support Of Appellant's Position/Pursuant To The Court's Rule 500.4" at P.5-6, 11-12, 18 (February 17, 1992); and also in petitioner's

"Reply Comments" of March 9, 1992 at P.1-6, P.11. This court affirmed, for the reasons stated in the Appellate memorandum--without comment, pursuant to petitioner's equal protection claims.

2. "DUE PROCESS"

NEW YORK COUNTY SUPREME COURT

First raised in the (IAS) motion court (RA at 15, January 12, 1984, "Verified Petition). Petitioner advanced, in the petition, supra, that the respondents failed to notify him that he had passed Exam 8539. In a "Reply Affirmation," dated May 8, 1984, petitioner, again, reiterated that the respondents did not notify him, of his having passed Exam 8539, until after his retirement (RA at 98-99). On June 27, 1984, the motion court dismissed the petition (RA at 101-105); the court noted (RA at 104) that the respondents' failure to notify petitioner that he had passed the re-rated examination, before his retirement, constituted the Police Commissioner's refusal to

promote him.

Subsequent to the court's denial of his motion, supra, and prior to his second motion to renew, petitioner filed (upon the advice of his attorney) an action in the United States District Court, Southern District, pursuant to the provisions of 42 U.S.C., Sections 1983 and 1988, and the Fourteenth Amendment to the Constitution of the United States --for violation of due process; that court dismissed the action, based upon res judicata (RA at 246-258).

Pursuant to an "Affirmation In Support Of Motion To Renew" (September 23, 1986) petitioner advised the court (RA at 149) that, had he been advised by the PD Pension Section, that he was on the sergeant's eligible list--when he was being processed out of the PD--he would not have waived his accrued leave; and would have retired on, or about, January 15, 1984; and, therefore, he would have been a member of the PD, when the others who had passed the re-scored exam were promoted on September 12, 1983.

Pursuant to an "Affirmation In Support Of Motion To Renew" (February 25, 1987, RA at 196-217) petitioner advised the court, again, of his failure to receive notice of his disqualification, and an opportunity to be heard; as required by New York Civil Service Law Section 50, 4 (RA at 199; by notice of a letter to the court, dated August 20, 1987, RA at 218-219, petitioner included a claim of violation of federally-protected due process--in addition to that of the state). That court remanded to the PD--and noted in its memorandum (RA at 268) petitioner's allegations that he was denied notice of, and an opportunity to oppose, disqualification.

In an "Affirmation In Support Of Motion For Contempt" (RA at 331-350) petitioner advanced to the court that he had been denied both state and federal due process (RA at 337-344). The motion court dismissed both the contempt motion and the Article 78 petition--without comment of the petitioner's due process claims (RA 361-364).

Petitioner filed a "Motion To Reargue" (October 8, 1990, RA at 365-399) and brought to the attention of the court (RA at 395) that, it had noted, in the memorandum opinion, thereof (RA at 268), that petitioner was denied notice of, and an opportunity to oppose, disqualification. Decision of the motion court (RA at 440-442) was to deny reargument, without comment of petitioner's contention, supra.

Petitioner filed an additional "Motion To Reargue" (February 11, 1991, RA at 443-456) and, again, brought to the attention of the court--that he was denied notice of, and an opportunity to oppose, disqualificaion (RA at 452), and that his constitutional rights had been violated (RA at 455). Decision of that court, although not a part of the record, was to deny reargument--without comment of the petitioner's contentions, supra.

APPELLATE DIVISION

Petitioner advanced his contention that the PD violated his due process rights, and that the Deas decision precluded adequate

state remedy (due process) to persons of his classification in Petitioner/Appellant's Brief at P.57-64, and P.67--wherein he requested relief pursuant to Section 1983 of Title 42, United States Code; which was served on July 2, 1991. Petitioner reiterated his claims of due process violations in his "Reply Brief" at P.11-13. By decision of that court, entered on December 12, 1991, the majority opinion held that, the "notice provision," of New York Civil Service Law Section 50 (4) did not apply to the petitioner's situation, because the consolidated list (#8539, which reflected the names of the additional passers, pursuant to rescoring) was not "officially" published until September 9, 1983; and which was after petitioner's retirement (P.B12-13 decision of that court).

THE DISSENT

The minority held that the petitioner had been denied "procedural" due process, by not having received timely notice of his disqualification, P.B21; and that the PD failed

to follow statutory procedures, by neglecting to give petitioner written notice of his disqualification, for medical reasons, pursuant to New York Civil Service Law Section 50 (4) P.B22-23. That court further held that, by failing to provide petitioner with notice of, and the reasons for, his disqualification--the PD deprived petitioner of the opportunity to make effective use of his statutory right to an administrative appeal, within the adjudicatory procedure established by Section 812 (C) of the New York City Charter(P.B24) The dissent specifically noted that:

> "although the revised eligible list was not promulgated and petitioner was not notified that he passed the rescored examination until after the effective date of petitioner's retirement, petitioner's disqualification took place, in effect, well before these dates, when he was omitted from the group which was notified to report for the indoctrination course on August 22, 1983. That action on the part of the Department constituted a de facto promulgation of the revised eligible list and, as such, violated the notice requirement of Civil Service Law Section 50 (4). In concluding that there is no legal authority which requires

> notification to an applicant that he or she had been disqualified prior to the promulgation of a new eligible list and a list of those who passed the rescored examination, the majority essentially takes the position that the Department need not notify an applicant of disqualification until after disqualification takes place, Civil Service Law Section 50 (4) clearly provides otherwise." (P.826-26)

Pursuant to a two Justice dissent, petitioner appealed, as of right, to the New York State Court of Appeals.

NEW YORK STATE COURT OF APPEALS

Petitioner advanced his contention , that the PD violated his due process rights in his "Jurisdictional Statement" at P.7-9, 12-13, 16-17, which was served upon the court on January 29, 1992. Petitioner advanced his contention, supra, in his "Argument In Support Of Appellant's Position/Pursuant To The Court's Rule 500.4 at P.5, 8, 17-18, 20-23 (February 17, 1992); and also in his "Reply Comments" of March 9, 1992 at P.4-7, 10, 12-14. The petitioner advanced, in his "Reply Comments" of March 9, 1992, supra, substantial case law that supported his claim that,

in order to satisfy due process requirements, persons disqualified must be given notice of such events--and afforded an opportunity to be heard (P.13-14). That court affirmed, for the reasons stated in the Appellate memorandum--without comment, pursuant to petitioner's due process claims.

By notice of a letter (pro se), dated July 24, 1992, petitioner requested the court to reconsider its decision; and reiterated, therein, his claim of both equal protection and due process violations. That court denied reargument on September 22, 1992.

ARGUMENT

At first blush one might well inquire why the PD refused to accord the petitioner treatment, equal to that of the other officers, who were injured at least, if not more than he was. Although the petitioner is at a loss--for an explanation of the PD's actions, supra, he is compelled to make known to this Court that neither a disciplinary record, nor a criminal investigation (at any time) was the springboard for their determination. The petitioner was a model officer (noted on his annual performance evaluation in 1972, and again, by his commanding officer, in 1980), and in nineteen years of service, he was never the subject of disciplinary action--but was, however, awarded twenty-five medals by the Police Commissioner. This has remained undisputed, since the onset of this action, by the respondents.

EQUAL PROTECTION

Petitioner's claim of equal protection

violations is based upon both the PD's disparate treatment of him--and the State's failure to provide an adequate remedy to address grievances--such as petitioner's; whereby, "similarly situated" residents of New Jersey, Ohio and Texas enjoy more favorable treatment, pursuant to high-court holdings that are in [c]onflict with the New York State Court of Appeals' decision, Matter of Deas v. Levitt, 73 NY2d 525 (which pursuant to subparagraph .1 (b) of Rule 10 of this Court, warrants consideration governing review on writ of certiorari).

1. THE PD

After the petitioner's forced retirement from the PD (August 31, 1983), and subsequent to the first notice he received (September 15, 1983), that he had passed Exam 8539 (RA at 29), it was hinted to him that other PD members--also injured--were promoted to competitive positions; in addition to being allowed to remain with the PD. Due to the petitioner's in-

ability to confirm that these events had taken place (the PD withheld that they had), he could not petition the court to order the supporting records. As the result of diligence, the petitioner discovered--through clandestine efforts--that eight PD members, all of whom were injured at least, if not more serious than he was, were promoted, and allowed, subsequent, thereto, to remain with the Department. These events took place both before and after petitioner's passover; four individuals received six civil service promotions to the competitive ranks of sergeant, lieutenant and captain, and four were promoted to detective. McTigue (RA at 118, 153-160), Buckley (RA at 211-215), Duffy (RA at 161-178, 209), Pascarella (RA at 127, 322), Pastorella (RA at 127, 322) and Senft (RA at 127, 322) were identified, along with the supporting proof, to the motion court. The medical records of Buckley, and affidavits concerning Simpson and Mamet, although outside of the record, were handed-up to the Appellate Just-

ices at oral argument (respondents' Appellate Division Brief at P.6, f.n., 15, f.n.; respondents' letter submission, dated March 5, 1992, to the Court of Appeals at P.12, f.n.). By notice of a letter, dated October 15, 1991, respondent's counsel advanced her objection, to the Appellate Division Justices, that petitioner had handed-up the documents, supra, during oral argument--even though he had just obtained them. The events of these promotions, along with the supporting proof, although outside of the record, were advanced to the Court of Appeals--in petitioner's letter submission of February 17, 1992 (at P.12).

ISSUES

The Court of Appeals affirmed, pursuant to the holdings of the Appellate Division majority that:

1. The September 9, 1983 publication of the revised list--which reflected the consolidation of those who had passed, pursuant to rescoring of the exam--constituted its promulgation; which was nine days after the

petitioner's medical retirement became effective on August 31, 1983 (Appellate memorandum at P.B11).

2. The "notice provision" of New York Civil Service Law Section 50 (4), pursuant to disqualification of eligibles, did not apply to the petitioner's situation--for the reason stated in item 1., supra (Appellate memorandum at P.B13).

3. The petitioner was distinguishable from the other disabled officers, because they were on "sick leave" when their promotions took place--and had not been approved by the Medical Board prior, thereto (Appellate memorandum at P.B14-15).

ARGUMENT

1. The only list at issue, in this matter, is the one which was delivered (pursuant to the rescoring of Exam 8539) to the PD on July 20, 1983. This contention is supported by the fact that all of the individuals, whose names appeared on the original

list, had already been promoted, therefrom--when the list of additional passers (200+), pursuant to the rescoring was delivered to the PD on July 20, 1983. And since the rescoring list is the only list at issue--it was when action had been undertaken by the PD, on this list that constituted its promulgation (Appellate Division minority, P 25 of memorandum); not when the consolidated list was published on September 9, 1983--the purpose of which was to reflect, by score placement, retroactive seniority [o]nly. The PD issued a notification on August 17, 1983 (RA at 83-87) directing the new passers to attend an indoctrination course, commencing on August 22, 1983; the petitioner was omitted from the group which was notified to attend the course. Petitioner, and the Appellate Division dissenters, contend that, that action, on the part of the PD constituted a de facto promulgation of the "revised" list, and, as such, violated the notice requirement of New York Civil Service Law Section 50 (4) (Appellate

Division memorandum at P.B25-26). This contention, supra, was advanced to the Court of Appeals in petitioner's letter submission of February 17, 1992 at P.14-17; and again, in his request to the Court to reconsider its decision, dated July 24, 1992 at P.2-3, 5.

2. In concluding that there is no legal authority which requires notification to an applicant, that he or she had been disqualified, prior to the promulgation of a new eligible list, and a list of those who passed the re-scored examination, the Appellate majority, essentially, took the position that the PD need not notify an applicant of disqualification until after disqualification has taken place. New York Civil Service Law Section 50 (4) clearly provides otherwise (this point will be addressed in petitioner's argument--contending due process violations).

3. **FIRST EQUAL PROTECTION VIOLATION**

The Appellate majority held, and the Court of Appeals affirmed that, petitioner was distinguishable from the other "disabled" officers,

because they were on "sick leave," and had not been approved by the Medical Board, prior to their respective promotions (Appellate memorandum at P.B15). The gravamen of this particular issue, and to which the State courts failed to give effect, is that it was action undertaken by the PD--that placed the petitioner before the Medical Board; his Police Surgeon (who held the rank of "Inspector" in the Department) ordered him to file for disability retirement (RA at 179, 208)--and which gave rise to that event. That action, on the part of the PD, whereby they placed the petitioner before the Medical Board--and forced him to retire--while others from a similar classification were treated "differently," and allowed to remain with the Department, [v]iolated petitioner's equal protection rights; which was further "ripened," when he was disqualified from, and the others, named, herein, were promoted to, competitive positions. Furthermore, respondents brought to the attention of the Court of Appeals that,

petitioner could have challenged, pursuant to New York City Administrative Code Section 13-206(d), the Medical Board's decision that he was medically unfit (respondents' letter submission of March 5, 1992, to the Court, at P.10). That statute provides that "any member, within thirty days after receipt of the decision by the Medical Board" may request that the Medical Board's determination be reviewed by a special medical board which shall consist of one doctor of the medical board and a doctor selected and compensated by such member." The petitioner was never advised, by the PD, that he could have challenged the Medical Board's determination, as provided for, supra; and since it was action undertaken by the PD that placed the petitioner before that board--they were under an obligation to inform him of his right to oppose their determination; which with proper notification, the petitioner would have done--especially since the Medical Board had conflicting findings; on February 8, 1983, the Medical Board de-

termined that the petitioner was not disabled, and recommended that his retirement application (which the petitioner reminds the Court, he did not file voluntarily) be disapproved (RA at 58). That determination, by the Medical Board, supra, was undertaken with the unrefutable knowledge that, accordingly, petitioner had to be restored to full police duties; each of the three members of that board, supra, examined the petitioner that day. However, on June 7, 1983, just four months later, and with no worsening of the petitioner's medical condition, the same members of the Medical Board held that, the petitioner had a partial disability, and recommended that he be retired (RA at 61). Petitioner contends that the PD's failure to notify him, that he could have opposed the Medical Board's decision, was unlawful, and deprived him of his right to be heard. Since the PD promoted, to competitive ranks, other members, who were injured at least, if not more than he was, and allowed them to remain with

the Department--serving in the ranks of sergeant, lieutenant and captain (demonstrated in petitioner's letter submission, of February 17, 1992, to the Court of Appeals--at P.12, 20), the petitioner could have, additionally, remained, and served in the ranks of police officer and/or sergeant. Pursuant to the medical conditions of the other injured members, named, herein, who were promoted, and allowed, in addition, thereto, to remain with the PD--the PD's determination, that placed the petitioner before the Medical Board, was [i]mproperly founded; and he had a "vested" right, therefore, to the review of that board's decision. And the PD's failure to notify the petitioner, that he was statutorily-entitled to oppose the Medical Board's determination, denied him the right to that review (raised in petitioner's "Reply" letter submission of March 9, 1992, to the Court of Appeals).

Essentially, the PD forced the petitioner to resign, based upon their determination that was improperly founded (taking into con-

sideration, the medical condition of the other PD members who were allowed to remain, therein), when they (his Police Surgeon) directed him to file for disability retirement (RA at 179, 208). And by failing to give the petitioner, proper notice of his right to oppose "their" Medical Board's determination, the PD snatched, not only his right to review, thereof--but his promotion and job as well! That action, on the part of the PD, whereby the petitioner was forced to file for disability retirement, constituted a removal--not a resignation. In the Matter of Kinney v. Ohio State Dept. Of Admin. Serv., 469 N.E.2d 1007 (1984) the Ohio Court of Appeals (that State's highest court) held that:

> "where an appointing authority induces a resignation as the only alternative to a removal based upon unfounded charges of misconduct, the resignation is ineffective to deny the employee his appeal to the State Personnel Board of Review. Under those circumstances, there has not been a resignation but, rather, a removal, the merits of which the employee should be

permitted to contest (P. 1007)."
(Emphasis added.)

That court, supra, remanded to the lower court, with instructions to reverse the decision of the administrative board, because the appellant, therein, did not have the opportunity to introduce evidence--directed toward establishing that the charges against him were unfounded (id., at 1010).

Similarly, in this matter, the petitioner was [c]ompelled to file for disability retirement, based upon a determination that was improperly founded. And, as the precise result of the PD's failure, to notify the petitioner--that he could have opposed the Medical Board's determination (and that they had treated others, similarly situated, differently), he was denied the opportunity to demonstrate, to that board, that others, some of whom were injured more seriously than he was, were permitted (by the Department) to perform the duties of both police officer and sergeant; without having been placed before that board

(as demonstrated by the fact that Sergeant Mary Buckley and Lieutenant Gerard P. Simpson both served in the ranks of police officer and sergeant, subsequent to their respective injuries; P.12, petitioner's letter submission (argument) of February 17, 1992, to the Court of Appeals).

The PD promoted four seriously injured members to six civil service positions, in addition to four others--to, and within the rank of detective. Due to the serious nature of the injuries, that these other officers sustained, the PD had to be aware of their medical conditions, when these promotions took place. And although the respondents repeatedly advanced, in their verified answers, that New York Civil Service Law Section 50, and Rule 4.3.2 of the City Personnel Director prevented petitioner's promotion (RA at 37-38, 133-134, 357), they failed to apply these disqualifying statutes against the other injured PD members--and effected their promotions. These promotions, supra, did not take

place as the result of administrative carelessness, negligence or an accident--they were "intentional." This contention is supported by the PD's having effected some of these promotions, subsequent to the filing of petitioner's judicial action--advancing, therein, that other officers, who were disabled and on sick leave, were receiving promotions, in contradiction to the reason that petitioner's was prevented. Therefore, the PD's application of New York Civil Service Law Section 50 (4), and Rule 4.3 2 of the City Personnel Director, to prevent the petitioner's promotion, in addition to forcing him to retire was intentional invidious discrimination. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits, among other things, [d]iscriminatory administration of a law neutral on its face (Yick Wo v. Hopkins, 118 U.S. 356, 373-74, 6 S. Ct. 1064, 1072-73, 1886).

The petitioner contends that the PD violated his equal protection rights, initially,

when they placed him before the Medical Board, by comparison to the other officers who, although they were "similarly situated" to him, were treated differently. Moreover, because it was action undertaken by the PD, that placed the petitioner before the Medical Board, that action did not make him distinguishable from the other injured members--who were treated differently. The gravamen of this particular issue, supra, is that the petitioner's medical condition persuaded his classification as "likened" to the other injured officers--and a ministerial act, undertaken by the PD (the directive to file for disability retirement--which placed him before the board) did not distinguish him from the others. Accordingly, the PD "further" violated petitioner's equal protection rights, when they prevented his promotion and forced him to retire--although they treated other injured officers differently.

2. **DEAS DENIES EQUAL PROTECTION**

The New York State Court of Appeals de-

cision of Deas v. Levitt, 73 NY2d 525 denies residents equal protection, which is enjoyed by "similarly situated" residents of New Jersey, Ohio and Texas. The pertinent text of the Fourteenth Amendment to the Constitution of the United States provides:

> "Section 1. ...**No** State shall **make** or **enforce** any law which shall abridge the privileges or immunities of citizens of the United States; **nor** shall any State **deprive** any person of life liberty or **property** without **due process** of law; **nor deny** to any person within its jurisdiction, the **equal protection of the laws**." (**Emphasis supplied**)

With the "expiration" of one's eligible list, Deas [d]efeats a judicial challenge to an administrative determination--with but one narrow exception; even if that challenge was timely commenced, and during the life of the list. To obtain relief, pursuant to Deas, one must commence a judicial proceeding, during the life of his/her eligible list, challenging the constitutionality (validity) of that list; should the list at issue expire, while the proceeding is sub judice, Deas

accords placement on a "special eligible list," should the individual prevail on the merits of his/her challenge. Paradoxically, Deas accords a remedy to one who challenges the constitutionality of an eligible list--should that list expire, while the proceeding is sub judice, but denies relief to one who challenges the constitutionality, of an administrative determination that prevented his/her promotion.

In the Matter of Charles v. Baesler, 910 F.2d 1349 (6th Cir., 1990) the petitioner, therein, filed a 42 U.S.C. Section 1983 action almost two years after his eligible list had expired--challenging the determination that prevented his promotion. And although the eligible list, on which the petitioner's name appeared, had expired, substantially before he commenced the proceeding--the district court granted partial judgment; the petitioner appealed the adverse portions of the judgment. The government specifically argued, at appeal, that their code did not create a right to promotion from an expired promotion list. The

United States Court of Appeals, Sixth Circuit, noted (id., at 1352) that the court below rejected that argument--and stated, further:

> "In the absence of any discussion of these state-law issues by the Kentucky courts, **we see no cause to disturb the reasoned conclusions of the experienced Kentucky district judge**." (id., at 1352, **emphasis supplied**.)

For reasons "other than" that the petitioner's eligible list had expired, that court, supra, reversed and vacated the judgment entered below, and remanded, with instructions to dismiss without prejudice to petitioner's pursuit of state court remedy (id., at 1357).

In the Matter of Marranca v. Harbo, 41 N.J. 569, New Jersey's highest Court considered what was a fair reading of the statute which dealt with the impact of litigation upon the life of the employment list, and held that:

> "The sense of the statute seems clear enough: if there is a suit 'with respect to the filling of any position or employment from such eligible list,' **justice should not be denied because the list expired during the pendency of the litigation** (1964)."

(id., at 573, **Emphasis supplied.**)

See also Malone v. Fender, 80 N.J 129 (1979, Supreme Court of New Jersey).

New Jersey Administrative Code title 4A (4A:4-3.4), as amended November 6, 1989, provides for the revival of eligible lists.

In the Matter of Shirokey v. Marth, 585 N.E.2d 407 (Ohio, 1992), the petitioner/firefighter filed an action--subsequent to the expiration of his civil service eligible list--pleading, inter alia, that he had been "improperly" passed over for promotion; that his constitutional due process rights, pursuant to Section 1983, Title 42, U.S. Code, had been violated. Although the petitioner, therein, commenced the action subsequent to the expiration of his eligible list--the trial court granted partial judgment; and the Court of Appeals affirmed (id., at 409). The Ohio Supreme Court reversed, for reason "other than" that, the petitioner's eligible list had expired; that the state's judicial review and administrative processes allowed

for a full consideration of petitioner's claim (id., at 414).

In the Matter of Duckett v. City of Houston, 495 S.W.2d 883 (Supreme Court of Texas, 1973), the petitioner/firefighter filed an action--subsequent to the expiration of his eligible list--seeking to compel his promotion to assistant arson investigator. The trial court granted summary judgment and, upon appeal, the Court of Appeals reversed and remanded. The petitioner appealed to the Supreme Court--and although the action was commenced, **after his eligible list had expired**, that State's highest Court reversed the judgment of the Court of Appeals, and affirmed that of the trial court (id., at 887). (**Emphasis supplied.**) The respondents also argued that any rights Duckett may have had were subject to the Fire Chief's authority, pursuant to his option to appoint one of three persons standing highest on the list--the Court noted:

"...and the record here does not

> establish that the Fire Chief did not have valid reason for rejecting Duckett's appointment. But, the Fire Chief did not purport to invoke this statutory procedure for rejecting Duckett as an otherwise eligible person and in our view **Duckett did not have the burden of showing that he would not have been upheld had he done so."** (id., at 887, **Emphasis supplied.**)

Similarly, in petitioner's case, respondents have raised that the Police Commissioner could have prevented the petitioner's promotion--pursuant to his discretion to appoint one of three persons standing highest on the list (New York Civil Service Law Section 61). As in Duckett, supra, "could have," or "should have" falls short of hitting the mark! Moreover, the respondents have consistently advanced, to the state courts, that the Police Commissioner prevented petitioner's promotion, for reason of his medical condition.

In the Matter of Firemen's & Policemen's Civil Serv. Com'n v. Kennedy, 514 S.W.2d 237 (Supreme Court of Texas, 1974), that State's highest Court held that:

"Anyone who established his right

to the highest grade on the list would have been entitled to first consideration by the head of the department **even though the list had expired while the case was making its way through the courts** " (id., at 240, **Emphasis supplied.**)

CONCLUSION
EQUAL PROTECTION

These State high Court decisions, including that of the United States Court of Appeals, Sixth Circuit, establish their scrutiny of due process rights, and the protection, thereof. Moreover, these high court holdings demonstrate [c]onflict, with New York's high court holding in Deas v. Levitt, 73 NY2d 525--pursuant to federal questions of both due process and equal protection; as New York's precludes, that which is enjoyed by New Jersey, Ohio and Texas residents. And petitioner respectfully contends that these conflicts warrant the consideration of review of this Court (Part 111 Rule 10, .1. (a), (b), thereof). The facts of this matter, and the evidence presented to the State courts--in support of petitioner's contentions--warranted their finding of equal pro-

tection violations. This invidious discrimination, on the part of the PD--in their treatment of the petitioner--is, indeed, that which the drafters of our Constitution's Fourteenth Amemdment intentioned to prevent!

In summary, the PD violated petitioner's equal protection rights when they undertook the action (directive from his Police Surgeon, to file for disability retirement, RA at 179, 208) that placed him before the Medical Board--although they treated a "substantial" number of similarly situated officers differently. Petitioner reminds this Court that, that action, on the part of the PD, supra, constituted an unwarranted and unlawful removal of him. And that the PD further violated petitioner's equal protection rights, when they prevented his promotion--although they promoted other officers, under the [p]recise circumstances, for which they advanced, was the reason they prevented his promotion; in addition to allowing them to remain with the Department.

ARGUMENT
DUE PROCESS

Petitioner contends that this Court, as designated last-resort guarantor of Constitution's command, possesses and must use power equal to its responsibility and sometimes must act in areas reserved to state courts (as policy of non intervention). The right to a hearing, before a governmental agency, whose proposed action will affect the rights, duties, powers or privileges of, and is directed at, a specific person, has long been imbedded in our jurisprudence; and the touchstone of that due process is fundamental fairness (U.S C.A. 14; West's Ann. Const., Art. 1, Section 7, A). Therefore, the fundamental due process requirements of a "fair" and "impartial" hearing are **reasonable** notice and a **reasonable** opportunity to be heard (Anderson Nat. Bk. v. Luckett, 321 U.S. 233, 64 S. Ct. 599, 88 L.Ed 692, **emphasis supplied**). Petitioner contends that he was denied procedural due process--since he was

[n]ever notified that, he had passed Exam 8539; he was statutorily-entitled to oppose the Medical Board's determination; he had been disqualified from promotion (New York City Administrative Code 13-206 (d), New York Civil Service Law Section 50, 4), by the PD. Further that, the New York State Court of Appeals holding in Deas v. Levitt, 73 NY 2d 525, denied him (as well as a substantial number of others each year) procedural due process; that its restriction, pursuant to the expiration of an eligible list, precludes adequate State post-deprivation remedy--and which, thereby, defeats one's **reasonable** opportunity to be heard. New York Civil Service Law Section 50 (4) provides that:

> "No person shall be disqualified pursuant to this subdivision unless **he has been given a written statement** of the reasons therefor **and afforded an opportunity to make an explanation and to subfacts in opposition to such disqualification** " (Emphasis supplied.)

There are no exceptions either expressed, or implied in the "notice provision" of the law, supra. Moreover, there is substantial case law that supports petitioner's contention--to satisfy due process requirements, applicants and/or eligibles must be notified of their contemplated disqualification, and afforded an opportunity to be heard; petitioner demonstrated the supporting law to the Court of Appeals ("Reply" letter submission of March 9, 1992, P.13-14; letter requesting reconsideration of the Court's decision, July 24, 1992 at P.6)--see Griffin v. Carey, D.C.N.Y. (1982) 547 F. Supp. 449; Matter of City of New York v. City Civil Service Com'n, (1988) 141 Misc.2d 276, 532 N.Y.S.2d 626; Ferrine v. Babou, (1980) 75 A.D.2d 669, 426 N.Y.S.2d 853; Matter of Canarelli v. New York State Dept. of Civil Service, (1974) 44 A.D.2d 645, 353 N.Y.S 2d 275; Hart v. Bronstein, (1974) 43 A.D.2d 936, 353 N.Y.S.2d 186; Dower v. Poston, (1973) 76 Misc.2d 721, 351 N.Y.S.2d 272. It is the "anticipation"

of disqualification that [r]ipens the "notice provision" of New York Civil Service Law Section 50 (4). And, although the Appellate majority and the Court of Appeals held that, the petitioner was not entitled to notice of, and an opportunity to oppose his disqualification (Appellate memorandum at P.B12-13)--because the revised eligible list was not published until September 9, 1983, which was after the petitioner's retirement, it was when petitioner's disqualification took place, that "ripened" the "notice provision" of the law, supra; and that event took place, in effect, well before petitioner's retirement (August 31, 1983), and the date that the revised list was published (September 9, 1983). Petitioner's disqualification, in fact, took place prior to August 17, 1983, the date that the other passers were notified to attend the indoctrination course, and from which he was omitted (RA at 83-96); that action, on the part of the PD, constituted a de facto promulgation of the revised

eligible list and, as such, violated the "notice" requirement of Civil Service Law Section 50 (4), supra (Appellate dissent at P.B25-26 Appendix). Furthermore, the September 9, 1983 publication of the revised eligible list (which took place prior to the date that the other, additional passers were promoted--September 12, 1983, RA at 35) could **not** possibly have constituted its promulgation; since **all** of the **original** passers had **already** been promoted, from List 8539, when the list of additional passers, pursuant to the re-rating of that Exam, was delivered to the PD on July 20, 1983 (RA at 34). Therefore, the only list that was at issue, in this matter, was the one that was delivered to the PD on July 20, 1983; and it was when the PD undertook action, on this **"particular"** list, that constituted its promulgation; and that event took place **prior** to August 17, 1983--which was the date that the other passers were notified, by the PD, to attend the indoctrination course (RA at 83-96, **emphasis supplied**

for ease of comprehension). Petitioner brought this issue to the attention of the Court of Appeals, and demonstrated the supporting evidence, in his letter submission (argument) of February 17, 1992, thereto, at P.14-17, and again, in his July 24, 1992 request of the Court, to reconsider its decision, at P.2-3, 5. Petitioner reminds the Court that, the day on which he was ordered to report to the PD Pension Section, for processing (September 1, 1983), he was **unaware** that he had passed Exam 8539--and that the PD had disqualified him from promotion; further that, he waived over 105 days of accrued leave and retired effective August 31, 1983, pursuant to the advice of processing personnel, thereat, that by doing so--petitioner would reduce his tax liability for that year. With the benefit of "notice," as required by statute, that he had been disqualified from promotion, petitioner could have remained a member of the PD well past the date that the

others were promoted, from the "additional" list (September 12, 1983)--by utilizing the leave, supra--and challenged the Police Commissioner's decision. In January of 1992, 132 candidates--who had been notified of their contemplated disqualification, by the PD, from appointment to police officer--**appealed** to the New York City Civil Service Commission; however, their List (#7009) expired, and pursuant to Deas, consideration for appointment ends with that event. And, because **no** review, of any of the determinations was possible, that Commission **vacated** "each" disqualification. The Commission, supra, advised the appellants (P.K1-7, letter notification) that, they could raise a number of claims for relief: 1) a claim that the City's delay in processing appeals to the Commission and/or disqualifying appellants was in **bad faith**, Deas, 73 NY2d 525, 533, fn.1, **emphasis supplied**; 2) a claim that the City's determination violates a liberty or property interest of appellant, or that

appellant is entitled to a name-clearing hearing, see Matter of City of New York v. City Civil Service Commission (Gariti), 141 Misc. 2d 276, 1988; and/or 3) a claim that the City failed to properly carry out its authority, to determine the eligibility of a candidate, see Levoci v. Brown, NYLJ Sept. 20, 1991 at 22, col.3. That action, supra, on the part of the appeals' "host," **bolsters** petitioner's contention that, his disqualification was **improper, unlawful and an act of bad faith**, on the part of the PD. With the advent of petitioner having had the opportunity, to appeal his disqualification, before the Commission, supra, concomitant with candid notice from the PD, thereto, that they, in fact, had not disqualified--from promotion--a substantial number of other seriously injured officers, there is no doubt, he would have prevailed; and that event could have taken place **prior** to the expiration of petitioner's eligible list (September 19, 1984, RA at 296). The high court holdings of Texas, Ohio and New Jersey (illustrat-

ed in equal protection argument) are in **conflict** with New York's holding in Deas--by their **not** limiting relief to the life of one's eligible list; which, by New York's failure to provide a similar, adequate remedy, to "likened" residents, denies them, due process. Moreover, in Duckett v. City of Houston, 495 S.W.2d 883, that State's high Court **compelled** the petitioner's promotion, **from an expired list--even though he had commenced the action, after it expired** (id., at 884, **emphasis supplied**). Petitioner had a "protected" property right to "notice" that, he could have opposed the Medical Board's decision (New York City Administrative Code 13-206, d); and the concomitant right to a hearing--to defend against the taking of his job, for medical reasons. This contention is based upon the facts that, other officers, who were equally, if not more seriously injured than the petitioner, were allowed to remain within the Department, **and serve in the very rank**--for

which the petitioner was denied promotion, and forced to retire. Petitioner's appointment, to the PD, was accepted, by both him and the City, with the expressed condition, that he could occupy a position, therein, for 20 years, and, at his option, either retire, or remain until age 63; hence, petitioner had a tenured contract with the City of New York. In Charles v. Baesler, 910 F.2d 1349 (6th Cir. 1990), the United States Court of Appeals noted:

> "In sum we do not conclude that all state-created rights lack substantive due process protection. For example, substantive due process may well protect a contract right **to keep a tenured job**, Ramsey v. Bd. of Ed., Whitley County, Kentucky (6th Cir., 1988), 844 F.2d 1268, 74-75 (dicta), although it may also be, in light of the fact that 'substantive due process rights are created only by the Constitution,' Regents of the University of Michigan v. Ewing, 474 U.S. 214, 229, (Powell, J., concurring), that **tenure is in fact a protected fundamental liberty interest once it is conferred by contract**. See Harrah Independent School District v. Martin , 440 U.S. at 197-98. Cf. Sullivan v.

Brown, 544 F.2d 279, 283 (6th Cir. 1976) (liberty interest in continuing employment opportunity)."
(id., at 1355, **emphasis supplied**.)

The instant dispute involves an interest of sufficient weight to merit the protection of the **substantive** due process clause--as well as **procedural**. The vast number of individuals, throughout the State of New York, who are both denied appointment to civil service positions, through disqualification--and their court standing to oppose same, pursuant to the draconian effect of Deas--supports petitioner's contention, supra. The right to oppose one's disqualification, from a civil service appointment, has evolved into a **fundamental right**, in the United States; substantial court decisions support this contention. Moreover, all that would be required of an appointing agency, to disqualify an individual--who could not otherwise, be properly rendered unfit--is to withhold notice, until just prior to the expiration of his/her eligible list; and the cloak of Deas will sterilize the determination,

by defeating that individual's opportunity to a judicial challenge. Petitioner had a "protected" property right to be **fairly** considered for appointment to sergeant--and both notice of, and a hearing to oppose his disqualification. This contention is based upon the facts of the promotions of a substantial number of other seriously injured officers, who the PD failed to disqualify--and were allowed to remain, therein. Those actions, on the part of the PD, supra, demonstrate, unequivocally, that the petitioner **was never fairly considered** for **equal** treatment; and the petitioner had the right to wage a battle, to protect his interest--**in securing the same benefits that the others enjoyed**!

The dissenting opinion of the Deas Court (per Justice Hancock, Jr., J.) specifically noted, with regard to a **property interest** in being fairly considered for appointment, that:

> "Preliminarily, it should be evident that petitioner's due process argument **does not** depend on a claimed State law right to appointment. Rather, his property interest stems from his expect-

ancy under State law of being **fairly considered** for a position based upon his relative merit and fitness. The **distinction** is **critical** because the cases relied on by the plurality (Matter of Cassidy v. Municipal Civ. Serv. Commn., 37 NY2d 526; Board of Regents v. Roth, 408 US 564) involve **claimed property rights to appointment**. An applicant, such as petitioner, who ranks in the top three for a particular position **must be considered**, as a matter of statutory right, unless there is some **valid** ground for finding the applicant unfit (see Civil Service Law Section 50 [4]; Section 61). Petitioner's State property interest includes the right to be **fairly considered** solely on the basis of his relative qualifications. It also includes the concomitant right **not to be excluded** from consideration for a merited appointment by being mistakenly disqualified. It is to assure this protection that the State has devised the appeal procedures which petitioner used here see, e.g., NY City Charter Sections 812 [c]; 813 [a] [3]-[8]; [b] [5]; 73 NY2d 525 540." (**Emphasis supplied.**)

"In Matter of Cassidy v. Municipal Civ. Serv. Commn., supra, we stated that 'petitioner does not possess any mandated right to appointment or any other legally protectible interest. He can assert at most the right to consideration for and a **hope** of appointment" (37 NY2d 526, 529). The plurality underscores the phrase '**or any**

> other legally protectible interest' apparently to demonstrate that we held there is no right to be considered for appointment. In Cassidy the plaintiff, however, had been considered. His only claim was to appointment. thus, we could not and did not hold that there is no property right to consideration."(F n. [4], id., at 540, Deas v. Levitt, 73 NY2d 525, emphasis supplied.)

Although the plurality, in the Deas Court, relied on Cassidy, supra, to hold that, there is no property interest in being fairly considered for appointment--their holding was in conflict, thereto; Cassidy had been considered--his only claim was to appointment. Petitioner supports his contention, that he had a protected property interest in being fairly considered for promotion with the Federal District Court for the Southern District of New York's holding in the Matter of Drogan v. Ward, 675 F. Supp. 832. That Court, supra, held that, Civil Service Law Section 61 and section 3.6 of the Rules and Regulations of the Department of Civil Service (4 NYCRR) served to provide an applicant, who has successfully

passed an examination with a **"claim of entitlement"** to be considered for promotion or appointment (see also, Griffin v. Carey, 547 F. Supp. 449, 453). Petitioner brings to the attention of the Court that, while Deas was able to make effective use of the administrative appeal process--he was **denied** a **reasonable** opportunity to be heard, by not having been notified of his disqualification; and that distinguished him from Deas. The PD's failure to notify the petitioner of his disqualification, demonstrates, unequivocally, that they never fairly considered him for promotion. And, because the other seriously injured officers (who were both promoted and allowed to remain with the PD) were deemed to be fit for, and merited promotion--petitioner's disqualification was **invalid**, and must **not** be allowed to stand!

Deas **defeats** the Constitutional guaranty of a hearing (post deprivation), and spoils a process that **must be** fundamentally fair--and, as such, fails to provide an adequate state

postdeprivation remedy. In the Matter of Zinermon v. Burch, (1990) 494 U.S. 113, 125, this Court stated that, "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions--as well as a guaranty of a fair procedure." The New York State Court of Appeals' holding in Deas, that provides a remedy for those who challenge the constitutionality of their civil service eligible list--but denies similar relief, to those who challenge the constitutionality of his/her denied appointment, from a similar list--is **arbitrary, wrongful** and **unfair.**

CONCLUSION
DUE PROCESS

The PD's **refusal** to notify the petitioner that, he had passed Exam 8539; he was statutorily-entitled to oppose the Medical Board's determination; he had been disqualified from promotion--**denied** him **reasonable** notice of these events and, thereby, **prevented** any opportunity for him to be heard. And, further

that, the Court of Appeals' holding in Deas, which **restricts** one's relief, in matters such as this, to the life of his/her eligible list, **debars** an adequate State postdeprivation remedy--and **violates** the Constitutional **guaranty** of both due process and equal protection to New York's residents. The actions, on the part of the PD--as mentioned, herein--**violated** petitioner's Constitutional right to, and guaranty of, both due process and equal protection!.

RELIEF SOUGHT

In the event that this Court grants summary judgment, instead of certiorari, petitioner requests--in addition to the relief sought--reasonable damages, for the PD's **willful** violations of his equal protection and due process rights; pursuant to **Section 1983 of Title 42, U.S. Code, with costs.**

AND

That this Court issue an order that the petitioner be immediately reinstated to the PD, at the rank of full pay sergeant--to in-

clude the following:

a. Service and pensionable credit for his entire absence from the PD.

b. That he be allowed to remain, therein, or retire at his option.

c. The difference between that of a police officer and sergeant--with interest--in his pension allowance, for the entire period of his absence from the PD.

d. Makeup exams for lieutenant and captain.

e. Any, and all other benefits due him, during his absence, commensurate with the rank of sergeant, **OR**

Issue an order mandating that the PD immediately rerate, **retroactively**, petitioner's retirement allowance, to that of **sergeant**, with commensurate accrual of interest; including his request, pursuant to Section 1983 of Title 42, U.S. Code--**with costs**. Any and other relief that, to this Court, is just and proper.

APPENDIX
Rule 14(h)

Federal Question
"EQUAL PROTECTION"

COURT RAISED IN	LOCATION IN PETITION	LOCATION IN RECORD
New York County Supreme	10-14	110-111 130-136 139-141 142-181 196-219 206-207 218-219
Decision		262-271 340-344
Decision		361-364 377-380 398-399 414 420-422
Decision		440-442 452-456
Appellate Division	14-15	Petitioner's Brief 7-23, 67
Court of Appeals	15-16	Jurisdictional Statement 5-7
		Letter submission of 02/17/1992 5-6, 11-12, 18

APPENDIX

COURT RAISED IN	LOCATION IN PETITION	LOCATION IN RECORD
Court of Appeals (cont.)		Reply Comments of 03/09/1992
	15-16	1-6, 11
		Request For Reconsideration of 07/24/1992
	23	5, 7, 10

"DUE PROCESS"

		R/A
New York County Supreme	16-19	15
		98-99
Decision		101-105
		149
		196-217
Letter submission		218-219
Decision		268
		331-350
Decision		361-364
		365-399
Decision		440-442
		443-456
Decision (as was RA at 440-442)		Not part of record
United States District Court, Southern Dist.	17	
(Decision)		246-258

APPENDIX

COURT RAISED IN	LOCATION IN PETITION	LOCATION IN RECORD
Appellate Division	19-20	Petitioner's Brief 57-64, 67 Reply Brief 11-13
Court of Appeals	22-23	Jurisdictional Statement 7-9, 12-13, 16-17 Letter submission of 02/17/1992 5, 8, 17-18, 20-23 Reply Comments of 03/09/1992 4-7, 10, 12-14 Request For Reconsideration of 07/24/1992 1-3, 6-8, 10-11

APPENDIX
Rule 14(k)

Exhibit "A" Decision of the New York State Court of Appeals (06/11/1992).

Exhibit "B" Decision of the New York County Supreme Court, **Appellate Division** (12/12/1991).

Exhibit "C" Decision of the New York County Supreme Court (04/01/1991).

Exhibit "D" Decision of the New York County Supreme Court (01/22/1991).

Exhibit "E" Decision of the New York County Supreme Court (08/23/1990).

Exhibit "F" Decision of the New York County Supreme Court (10/28/1987).

Exhibit "G" Decision of the United States District Court, Southern District (06/26/1987).

Exhibit "H" Order denying **reargument**, "Motion No. 959," of the New York State Court of Appeals (09/22/1992).

Exhibit "I" Order of the **Honorable Clarence Thomas**--extending the time to

APPENDIX

file for writ of certiorari, to and including, February 19, 1993.

Exhibit "J" Notification from the New York City Police Department--denying petitioner retroactive promotion.

Exhibit "K" Memo from the New York City Civil Service Commission to 132 individuals--who had appealed, thereto, their **disqualifications** from appointment to police officer--advising that each had been vacated; pursuant to that Commission's inability to effect review, because their eligible list had expired (citing Deas v. Levitt, 73 N.Y.2d 525).

APPENDIX

RULE 14(F)

New York City Administrative Code Section 13-206(d) (demonstrated as item 1. on Page 2 of petition), pertinent text:

> "Any member, within thirty days after receipt of the decision by the Medical Board may request that the Medical Board's determination be reviewed, by a special medical board, which shall consist of one doctor of the Medical Board, and a doctor selected and compensated by such member."

Rule 4.3.2 of the New York City Personnel Director (item 4.):

> "Any physical or mental disability, disease, injury, abnormality, defect or the history thereof, which renders a person unfit for the performance of the duties of the position the person seeks, or the failure to meet the required medical or physical standards of a position, **shall constitute grounds for the disqualification of such person."** **(Emphasis supplied.)**

United States Code, Section 1983 of Title 42 (item 5.):

> "Every person who, under color of any statute, ordinance, reg-

ulation, custom, or usage of any State or Teritory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the **deprivation** of any rights privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (**Emphasis supplied.**)

Dated: Massapequa, New York
February 10, 1993

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